

FILED
IN THE UNITED STATES DISTRICT COURT
ALBUQUERQUE, NEW MEXICO
FOR THE DISTRICT OF NEW MEXICO
SEP 23 2004

REYNALDO HOLGUIN,

Petitioner,

v.

RICK LOONEY, Warden, *et al.*,

Respondents.

CLERK

Civ. No. 04-889 MCA/RLP

MAGISTRATE JUDGE'S PROPOSED
FINDINGS AND RECOMMENDED DISPOSITION¹

1. This is a proceeding brought pursuant to 28 U.S.C. § 2254. Petitioner is currently incarcerated at the Torrance County Detention Center in Estancia, New Mexico. After a jury trial, Petitioner was convicted of several second, third, and fourth degree felonies in *State v. Holguin*, CR-2001-0268 in the Third Judicial District Court, State of New Mexico, County of Doña Ana. The Judgment and Order Partially Suspending Sentence, sentenced him to 16 years' imprisonment, followed by two years of parole. The Judgment was entered on April 5, 2002. Answer [Doc. 10], Exhibit A thereto.

2. Respondents have filed a Motion to Dismiss [Doc. 8], arguing that the petition for writ of habeas corpus is time-barred by 28 U.S.C. § 2244(d)(1)(A). Having reviewed the record, the court agrees that the petition is untimely.

¹ Within ten (10) days after a party is served with a copy of this Proposed Findings and Recommended Disposition (hereinafter "Proposed Findings") that party may, pursuant to 28 U.S.C. § 636(b)(1), file written objections in the United States District Court to the Proposed Findings. A party must file any objections within the ten-day period allowed if that party wants to have appellate review of the Proposed Findings. If no objections are filed, no appellate review will be allowed.

3. Petitioner appealed his conviction and the New Mexico Court of Appeals affirmed on February 18, 2003. Exhibit H. He filed a petition for writ of certiorari, Exhibit I, which was denied on April 2, 2003, Exhibit J. Petitioner did not appeal to the United States Supreme Court, but the statute is nevertheless tolled during the time (90 days) he could have appealed. See *Rhine v. Boone*, 182 F.3d 1153 (10th Cir. 1999).

4. The one-year limitation period started to run on July 1, 2003 (April 2, 2003 plus 90 days). Petitioner thus had until July 1, 2004 to file his petition in federal court. His petition is dated August 2, 2004 and was entered on the court's docket on August 5, 2004. Under either date, the petition is untimely. § 2244(d)(1)(A). Petitioner does not assert any grounds in his petition why the court should apply the doctrine of equitable tolling to his petition.

RECOMMENDED DISPOSITION

I recommend that the Motion to Dismiss [Doc. 10] be granted and this case be dismissed with prejudice.

A handwritten signature in black ink, appearing to read 'Richard L. Puglisi', is written over a horizontal line.

Richard L. Puglisi
United States Magistrate Judge